No. 92-1500

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1992

Paul Caspari, Superintendent of
the Missouri Eastern Correctional Center,
and Jeremiah W. (Jay) Nixon,
Attorney General of Missouri,
Petitioners,
v.
Christopher Bohlen,
Respondent,

On Writ of Certiorari
to the United States Court of Appeals
for the Eighth Circuit

Brief for Petitioners

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Questions Presented

I.

Whether the double jeopardy clause which prohibits the state from subjecting a defendant to successive capital sentencing proceedings should apply to successive non-capital sentence enhancement proceedings.

II.

Whether this Court's decision in *Bullington v. Missouri*, 451 U.S. 430 (1981) extends the protection afforded by the Double Jeopardy Clause contrary to the original intent of the clause as articulated by the terms of the Constitution and beyond the traditional protection of the clause.

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Opinions Below

The opinion of the United States Court of Appeals for the Eighth Circuit is reported as *Bohlen v. Caspari*, 979 F.2d 109 (8th Cir. 1992) and is reported in the Appendix to petitioners' petition for writ of certiorari. Appendix at A-3. The Order of the United States District Court for the Eastern District of Missouri is not reported but is included in that appendix at A-25. The Magistrate's report and

recommendation is not reported but is included in that appendix at A-27.

Jurisdictional Statement

The United States Court of Appeals for the Eighth Circuit issued its opinion on October 16, 1992. The motion for rehearing or rehearing en banc was denied on December 8, 1992. This Court has jurisdiction to review the instant case by writ of certiorari. This Court's jurisdiction to review the instant case by means of the writ of certiorari is set forth in 28 U.S.C. § 1254(1). Petitioners, Paul Caspari and Jeremiah W. (Jay) Nixon, timely filed their petition for writ of certiorari on March 5, 1993. This Court granted petitioners' petition seeking the issuance of a writ of certiorari to the United States Court of Appeals for the Eight Circuit on June 14, 1993.

Constitutional Provisions

The Fifth Amendment of the United States Constitution provides:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless in a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the militia, when in actual service

> in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Section One of the Fourteenth Amendment to the United States Constitution provides:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Section 558.016, RSMo 1986, in pertinent part, provides:

> 1. The court may sentence a person who has pleaded guilty to or has been found guilty of a class B, C, or D felony to a term of imprisonment as authorized by section 558.011, if it finds the defendant is a prior offender, or to an extended term of imprisonment if it finds the defendant is a

persistent offender or a dangerous offender.

2. A "prior offender" is one who has pleaded guilty to or has been found guilty of one felony.

3. A "persistent offender" is one who has pleaded guilty to or has been found guilty of two or more felonies committed at different times.

* * *

6. The total authorized maximum terms of imprisonment for a persistent offender or a dangerous offender are:

(1) For a class A felony, any sentence authorized for a class A felony;

(2) For a class B felony, a term of years not to exceed thirty years;

(3) For a class C felony, a term of years not to exceed fifteen years;

(4) For a class D felony, a term of years not to exceed ten years.

Section 558.021, RSMo 1986 provides:

1. The court shall find the defendant to be a prior offender, persistent

offender, or dangerous offender, if

(1) The indictment or information, original or amended, or the information in lieu of an indictment pleads all essential facts warranting a finding that the defendant is a prior offender, persistent offender, or dangerous offender; and

(2) Evidence is introduced that establishes sufficient facts pleaded to warrant a finding beyond a reasonable doubt that the defendant is a prior offender, persistent offender, or dangerous offender; and

(3) The court makes findings of fact that warrant a finding beyond a reasonable doubt by the court that the defendant is a prior offender, persistent offender, or dangerous offender.

2. In a jury trial, the facts shall be pleaded, established and found prior to submission to the jury outside of their hearing, except the facts required by subdivision (1) of subsection 4 of section 558.016 may be established and found at a later time, but prior to sentencing, and may be established by judicial notice of prior testimony before the jury.

3. In a trial without a jury or upon a plea of guilty, the court may defer the proof and findings of such facts to a later time, but

prior to sentencing. The facts required by subdivision (1) of subsection 4 of section 558.016 may be established by judicial notice of prior testimony or the plea of guilty.

4. The defendant shall be accorded full rights of confrontation and cross-examination with the opportunity to present evidence, at such hearings.

5. The defendant may waive proof of the facts alleged.

6. Nothing in this section shall prevent the use of presentence investigations or commitments under sections 557.026 and 557.031, RSMo.

7. At the sentencing hearing both the state and the defendant shall be permitted to present additional information bearing on the issue of sentence.

Statement of the Case

Respondent was charged with robbing Blust Jewelry Store at the Town and Country Mall in St. Louis County, Missouri. Respondent took currency and jewelry from the store and wristwatches from two employees. Respondent was convicted in the Circuit Court of St. Louis County,

Missouri, on three counts of the class A felony of robbery first degree, § 569.020, RSMo 1986, and sentenced as a prior and persistent offender under § 558.016.3, RSMo 1986, to consecutive terms of fifteen years imprisonment on each count. The Circuit Court, however, made no findings of fact that the defendant was a prior and persistent offender as required by §558.021.1(3), RSMo 1986. The conviction was affirmed on direct appeal by the Missouri Court of Appeals. *See State v. Bohlen*, 670 S.W.2d 119 (Mo.App. 1984) (A-63). However, the Court of Appeals remanded the cause for a determination of respondent's status as a prior and persistent offender. *Id.* On remand, the Circuit Court of St. Louis County found respondent to be a prior and persistent offender (J.A. 29) after receiving evidence that respondent had prior convictions for possession of heroin (J.A. 19), unlawful delivery of a controlled substance and two (2) counts of violation of Illinois' Controlled Substance Act (J.A. 20-21)(A-75). The Court again sentenced respondent to consecutive terms of fifteen years imprisonment on each count. The sentences were affirmed on appeal after remand. *See State v. Bohlen*, 698 S.W.2d 577 (Mo.Ct.App. 1985) (A-57).

Respondent also filed a post-conviction relief motion in the Circuit Court of St. Louis County, under former Missouri Supreme Court Rule 27.26 (repealed effective

January 1, 1988). Upon denial of that motion respondent appealed the Circuit Court's judgment, and the Missouri Court of Appeals affirmed. *See Bohlen v. State*, 743 S.W.2d 425 (Mo.Ct.App. 1987).

On September 5, 1989, respondent filed a petition for a writ of habeas corpus under 28 U.S.C. § 2254 in the United States District Court for the Eastern District of Missouri (A-84). After responsive pleadings, Magistrate David Noce recommended that respondent's petition be denied. The Honorable Clyde Cahill sustained and adopted the Magistrate's Report and Recommendation and denied respondent's petition on August 28, 1991 (A-25).

The United States Court of Appeals for the Eighth Circuit reversed and remanded the District Court's denial of respondent's petition for a writ of habeas corpus on October 16, 1992. *See Bohlen v. Caspari*, 979 F.2d 109 (8th Cir. 1992) (A-3). The Court held that respondent's double jeopardy rights had been violated by the Missouri Court of Appeals' remand of the case to the circuit court for a determination of respondent's prior and persistent offender status. The Federal Court of Appeals ordered respondent released from the custody of petitioners unless the state resentenced respondent without invoking the recidivism statute. Rehearing and rehearing *en banc* were denied on December 8, 1992 (A-83).

Summary of the Argument

This Court should reverse Court of Appeals because this Court has never held, and should not now hold, that the Double Jeopardy Clause applies to non-capital sentence enhancement proceedings. Indeed, this Court has previously declined to extend the Double Jeopardy Clause to non-capital sentence enhancement proceedings, *United States v. DiFrancesco*, 449 U.S. 117 (1980), and expressly reserved this issue in *Lockhart v. Nelson*, 488 U.S. 33, 37 n.6 (1988). This Court's expressed justifications for extending the Double Jeopardy Clause to capital sentencing proceedings in *Bullington v. Missouri*, 451 U.S. 430 (1981), do not exist in non-capital sentence enhancement proceedings. Thus, the Court of Appeals' application of *Bullington* to this case was error.

Extension of the Double Jeopardy Clause to non-capital sentence enhancement proceedings also is barred in this case under *Teague v. Lane*, 489 U.S. 288 (1989). This case is before the Court on collateral review. As pointed out above, this Court has never extended *Bullington* to non-capital sentence enhancement proceedings. Such an extension is not "dictated" by current federal Constitutional law. Moreover, the state court's determination that the Double Jeopardy Clause does not apply to non-capital

sentence enhancement proceedings was a good faith interpretation of existing case law at the time of respondent's appeal. *Butler v. McKellar*, 494 U.S. 407, 414 (1990). For all these reasons, any determination that the Double Jeopardy Clause extends to non-capital sentence enhancement proceedings cannot be applied to this case.

If this Court were to determine that under *Bullington* the Double Jeopardy Clause applies to non-capital sentencing proceedings, this Court should then consider whether *Bullington* should be overruled. There can be little quesstion that *Bullington* extends the protections offered by the Double Jeopardy Clause beyond the original intent of the framers and beyond the Clause's traditional protections.

Before *Bullington*, this Court never applied the Double Jeopardy Clause to sentencing that did not involve multiple punishments. *Bullington's* justifications for extending the Clause to capital sentencing proceedings do not pass rationale scrutiny. *Bullington v. Missouri, supra*, 451 U.S. at 448, n.2 (Powell, J. dissenting). Simply because the first jury declined to impose the death penalty does not establish, contrary to the implication of *Bullington*, that the prosecution failed to prove its case. *See Poland v. Arizona*, 476 U.S. 147, 155 (1986). Because the jury may have decided to grant a defendant mercy, the first jury's decision cannot constitute an implied acquittal of the death penalty,

nor can it constitute insufficient evidence for the death penalty. Under Missouri law, a jury need not determine that the aggravating circumstances do not exist in order to sentence a defendant to life imprisonment. A jury may do so even if all the aggravating circumstances are proved beyond a reasonable doubt. Thus, the jury's discretion in sentencing is greater than that of a jury during the guilt or innocence phase. Because *Bullington* extended the Double Jeopardy Clause far beyond what was intended by its framers and misinterpreted Missouri law while doing so, it should be overruled.

ARGUMENT

I.

The double jeopardy clause should not apply to successive non-capital sentence enhancement proceedings.

This case gives the Court the opportunity to limit the Double Jeopardy Clause principles announced in *Bullington v. Missouri*, 451 U.S. 430 (1981), to capital punishment cases.[1] *Bullington* should not be extended to non-capital sentence proceedings because non-capital sentencing proceedings do not inherently have the characteristics of a trial which allow for opening statements, testimony, introduction of evidence, jury instructions, final arguments and jury deliberations. Furthermore, non-capital sentencing proceedings allow a broad range of punishment as compared to the life-or-death option in capital sentencing proceedings. Likewise, the theory that "death is different" has no application in non-capital sentencing proceedings. Prior precedents, along with underlying logic and policy concerns,

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[1]Double Jeopardy protects against a second prosecution for the same offense after acquittal, a second prosecution for the same offense after conviction, and multiple punishments for the same offense. *North Carolina v. Pearce*, 395 U.S. 711 (1969). Double Jeopardy is enforced against the States through the Fourteenth Amendment *Benton v. Maryland*, 395 U.S. 784 (1969). None of these protections are implicated in this case.

establish that this Court should conclude that if the Double Jeopardy Clause has a role in sentencing proceedings, this role should be limited to capital sentencing proceedings only.

In *Bullington*, a slim majority of this Court held that Missouri's capital sentencing proceedings, which it characterized as "unique", *Id.*, 451 U.S. at 441, n.15, so resemble a criminal trial that they are subject to the Double Jeopardy Clause. That "uniqueness" is because capital sentencing proceedings entail opening statements, testimony, introduction of evidence, jury instructions, final arguments, and jury deliberations. *Id.*, 451 U.S. at 438, n.10. At Mr. Bullington's first trial he was convicted of capital murder and sentenced by the jury to life imprisonment. He successfully appealed his conviction and, before the second trial, the State gave notice that it would again seek capital punishment. Mr. Bullington's appeal eventually reached this Court, and this Court held that the Double Jeopardy Clause prohibited the State from seeking capital punishment after it unsuccessfully sought it at the first trial. This Court held that the procedural differences in capital sentencing proceedings contained in Missouri law, which include a bifurcated guilt and sentencing proceeding, was the "underlying rationale" of applying the Double Jeopardy Clause to capital sentencing proceedings. *Bullington v. Missouri*, *supra*, 451 U.S. at 441; *see also* §565.006, RSMo 1978; *Gregg v. Georgia*, 428 U.S. 153, 191

(1976).

Missouri law provides for no such trial-like procedures in non-capital proceedings.[2] Non-capital sentence enhancement proceedings do not include opening statements, jury instructions, final arguments or deliberations. Thus, *Bullington's* "underlying rationale" has no application to Missouri's non-capital sentencing proceedings.

The Double Jeopardy Clause was designed to protect an innocent defendant from the anxiety and insecurity of having to face repeated attempts by the prosecutor to obtain a conviction. Whatever justifications may exist to extend that protection to trial-like capital sentencing proceedings, they plainly do not warrant extending those protections to

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[2]Although the Court of Appeals indicated that Missouri's Prior and Persistent Offender Statute was "unique", it certainly does not contain the same or similar trial-like provisions relied upon by this Court in *Bullington* in characterizing Missouri's death penalty procedures as unique. Under Missouri law, the information or indictment must plead the basis for finding a defendant to be a prior offender. Evidence is presented outside the presence of the jury, §558.021.2, RSMo 1986, and the trial court must make findings that the defendant is a prior and persistent offender. §558.021.2, RSMo 1986. This finding must occur prior to submitting the cause to the jury. §558.021.2, RSMo 1986. Judicial notice of testimony before the jury may be used to establish a finding that the defendant is a prior and persistent offender, §558.021.2, RSMo 1986. Likewise, a defendant may waive proof of the facts alleged. §558.021.5, RSMo 1986.

ordinary non-capital sentencing proceedings. This is because a prior offender has the status of being a prior offender and this status cannot be changed by a statute requiring the state to prove the defendant's status. Nor can a defendant who has a prior conviction be subject to governmental oppression by the prosecutor's attempts to use the defendant's prior convictions on resentencing. The concerns of prosecutorial misconduct cannot exist since a defendant's prior convictions either do, or do not, exist. Logic requires that once a prior offender, always a prior offender absent a show of reversal or pardon of the prior conviction. The defendant does not lose his status as a recidivist by the government's failure to prove this status. A prior conviction cannot be expunged by the failure to comply with the statutory requirements of a prior offender proceeding.

Furthermore, the Double Jeopardy Clause should not be extended to non-capital sentencing proceedings because non-capital sentencing proceedings provide for a broad range of punishment. *Bullington* held that the Double Jeopardy Clause is applicable only when the sentencer is without discretion to exercise its authority and cannot apply a wide range of punishment. *Id.*, 451 U.S. at 444. *Bullington's* rationale is not applicable where, like in non-capital sentencing proceedings, the sentencer can exercise its discretion and select the punishment it believes is appropriate

for the offense and the offender. *Williams v. New York*, 337 U.S. 241 (1949).[3] When the sentencer has a wide range of punishment from which to choose, the Double Jeopardy Clause does not foreclose the issuance of a higher sentence upon resentencing. *North Carolina v. Pearce, supra.*[4]

In *Bullington*, this Court noted that the jury in capital punishment proceedings were "not given unbounded discretion to select an appropriate punishment from a wide range authorized by statute." *Id.* 451 U.S. at 438. Before, and after *Bullington* this Court has declined to extend the Double Jeopardy Clause to sentencing proceedings which authorize a wide range of punishment. In *North Carolina v. Pearce, supra*, this Court found that the imposition of a higher sentence by the trial court after a defendant was successful in having his conviction reversed on appeal did not bar the imposition of a higher sentence after retrial. This holding was extended to jury sentencing in *Chaffin v.*

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[3]The purpose of punishment is to assure that the punishment fits the offender and not merely the crime. *Williams v. New York, supra*, 377 U.S. at 248. The rehabilitation of a defendant is a factor the sentencer may consider. *Id.*

[4]Although a defendant cannot receive a higher sentence on resentencing due to vindictiveness by the sentencer, that is not because the Double Jeopardy Clause forbids the higher sentence but rather because the Fourteenth Amendment prohibits such misconduct. *North Carolina v. Pearce, supra* 395 U.S. at 725.

Stynchcombe, 412 U.S. 17 (1973). Likewise, this Court declined to extend the Double Jeopardy Clause to federal enhancement proceedings. *United States v. DiFrancesco*, 449 U.S. 117 (1980). In *DiFrancesco*, the prosecution appealed the imposition of sentence by the trial court. This Court held that given the broad range of punishment the court could impose, the Double Jeopardy Clause did attach. *Bullington v. Missouri, supra*, 451 U.S. at 440.

When a defendant voluntarily appeals his conviction, the Double Jeopardy Clause should not apply to sentencing issues. The defendant's actions removes the finality of his conviction and the attachment of jeopardy. Because the government did not choose to put the defendant twice "in jeopardy" when a defendant appeals his conviction, the rationale of the Double Jeopardy Clause does not apply.

Unlike the jury in *Bullington*, the judge in the present case could have sentenced respondent to a broad range of punishment.[5] The judge was not limited to imposing either

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[5]Respondent was convicted on three (3) counts of the Class A felony of first degree robbery (*§569.020, RSMo 1986*) and sentenced under §558.011, RSMo 1986, to fifteen years imprisonment on each count. The range of punishment for a Class A felony is a term of imprisonment not less than ten years and not greater than thirty years, or a term of life imprisonment. As a persistent offender, the judge could sentence respondent only within the range of a Class A felony. *§558.016.6, RSMo 1986.*

life imprisonment or capital punishment. *Bullington v. Missouri, supra* 451 U.S. at 438. Because the judge could have sentenced respondent within a range of punishment of ten to thirty years or to life imprisonment, the reasoning of *Bullington* is inapplicable to non-capital sentence enhancement proceedings. The lack of sentencing discretion, a rationale for the Court's application of the Double Jeopardy Clause to capital sentencing proceedings, is not present in this non-capital case.

The rationale that the Double Jeopardy Clause should apply to capital sentencing proceedings because "death is different" obviously does not exist in non-capital sentencing proceedings. Capital cases receive different review than non-capital cases. *Barefoot v. Estelle*, 463 U.S. 880, 913 (1983) (Marshall, J., dissenting) ("Time and again the Court has condemned procedures in capital cases that might be completely acceptable in an ordinary case. *See, e.g. Bullington v. Missouri*, 451 U.S. 430, 101 S.Ct. 1852, 68 L.Ed.2d 270 (1981)"). This Court acknowledged that the anxiety and insecurity faced by a defendant during a capital sentencing proceeding was "equivalent to that faced by any defendant at the guilt phase of a criminal trial." *Bullington v. Missouri, supra* 451 U.S. at 445. By contrast, although a defendant in non-capital sentencing proceedings may feel the insecurity of not knowing the length of his sentence, such

insecurity has never been found to violate the federal Constitution. *United States v. DiFrancesco, supra,* 449 U.S. at 136.

Once found guilty, the anxiety of sentencing is *de minimis*. The government oppression and the opportunity to convince a sentencer to impose the death penalty upon retrial does not exist in a non-capital sentencing proceeding. The defendant's interest of finality in a sentence is outweighed by societies' interest in assuring that the punishment fits the offender, which in this case is a convicted recidivist. *Williams v. New York, supra,* 337 U.S. at 248.

Sentencing is a discretionary function which allows the sentencer to impose a range of punishment, within the limits authorized by the legislature, to fit the offense for which the defendant stands convicted. To contend that a non-capital sentence proceeding subjects a defendant to the same anxiety as a defendant in a capital sentencing proceeding is illogical given the different natures of the punishment.

Even if this Court were to determine that the Double Jeopardy Clause extends to non-capital sentence enhancement proceedings, the extension should be barred in this case under *Teague v. Lane*, 489 U.S. 288 (1989). Because this case comes before the Court on collateral review, 28 U.S.C. §2254, retroactivity is an issue that must be addressed before

habeas relief can be granted to respondent. *Graham v. Collins*, 113 S.Ct. 892, 897 (1993). The grant of habeas relief to respondent would require the development of "new law". This Court has never extended *Bullington* to non-capital sentence enhancement proceedings. To the contrary, the issue was not addressed in *Bullington*, and was expressly reserved in *Lockhart v. Nelson*, 488 U.S. 33, 37 n.6 (1988).

In denying respondent's double jeopardy claim, the Missouri Court of Appeals relied on *State v. Holt*, 660 S.W.2d 735 (Mo.Ct.App. 1983) and *State v. Lee*, 660 S.W.2d 394 (Mo.Ct. App. 1983) (per curiam). The Federal Court of Appeals held that the Missouri state court's determination that the Double Jeopardy Clause does not apply to non-capital sentencing proceedings was "mistaken" and irrelevant. However, the Missouri court made "'a reasonable, good-faith interpretation of existing precedent.'" *Lockhart v. Fretwell,* 113 S.Ct. 838, 844 (1993), *quoting Butler v. McKellar*, 494 U.S. 407, 414 (1990). *Teague* protects state court judgments based on reasonable, good-faith interpretation of federal law, even though those interpretations later prove incorrect. Since the Missouri state court's opinion made a reasonable, good-faith interpretation of existing precedent, the fact that it was "mistaken" does not matter.

The Federal Court of Appeals' holding that "[e]xtending *Bullington* to non-capital sentence enhancement

hearings is not a sufficient stretch to cause it to be a new rule under *Teague*" is erroneous. The mere fact that the Court of Appeals "stretch[ed]" *Bullington* is itself sufficient to show it created a new rule. The protection afforded to the hundreds of capital prisoners on death row, is now extended to the hundreds of thousands of prisoners confined for non-capital offenses. Of course, the lower court's "stretch" analysis is improper *Teague* analysis. Rather, the Court of Appeals should have examined the legal landscape from this Court to determine if respondent was requesting the Court of Appeals to create new law. *See Gilmore v. Taylor*, 113 S.Ct. 2112, 2116-2118 (1993); *Graham v. Collins*, *supra*, 113 S.Ct. at 898. The survey of *Bullington* and *Lockhart v. Nelson* shows respondent requests the application of "new law."

II.

This Court's decision in *Bullington v. Missouri*, 451 U.S. 430 (1981) extends the protection afforded by the Double Jeopardy Clause contrary to the original intent of the clause as articulated by the terms of the Constitution and beyond the traditional protection of the clause.

Bullington's extension of the Double Jeopardy Clause to capital sentencing proceedings should be reconsidered and overruled because it is contrary to the plain language and constitutional history of the clause, all previous precedents of this Court, and common sense.[6]

Nothing indicates that the framers of the Constitution intended the Double Jeopardy Clause to apply to sentencing, either capital or non-capital. On June 8, 1789, James Madison proposed an amendment to the Constitution in the House of Representatives which held that "No person shall be subject, except in case of impeachment, to more than one punishment or trial for the same offense." J. Sigler, Double

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[6]This Court held in *United States v. Dixon*, 61 U.S.L.W. 483[illegible] (U.S. June 28, 1993), that *stare decisis* need not be followed "when governing decisions are unworkable or are badly reasoned." *Id.*, 61 U.S.L.W. at 4841.

Jeopardy, the Development of a Legal and Social Policy, Cornell University Press, N.Y. (1969), p. 28. However, the Senate version differed in that it substituted "be twice put in jeopardy of life or limb by any public prosecution" for the latter half of the House amendment. *Ibid. p. 31.* The "twice put in jeopardy of life or limb" language of the Senate version ultimately prevailed, and is contained in the Fifth Amendment. "In all probability, the drafters of the Clause intended to alter Madison's proposal only with a view to its clarification", that being a single trial for a single offense. *Ibid.* Extension of the Double Jeopardy Clause to sentencing is inconsistent with the "single trial for a single offense" meaning intended by the drafters.

The Double Jeopardy Clause has been consistently interpreted to prohibit only prosecution for the same offense after acquittal, a second prosecution for the same offense after conviction, and multiple punishments for the same offense. *North Carolina v. Pearce*, 395 U.S. 711, 717 (1969). Absolute finality has not been afforded in cases where the trial does not end in acquittal. *United States v. DiFrancesco*, 449 U.S. 117, 130 (1980). For instance, when a defendant invokes his statutory right to appeal, the Double Jeopardy Clause does not prohibit a defendant from being retried if he is successful in having his conviction overturned. *United States v. Scott*, 437 U.S. 82, 91 (1978).

Until *Bullington*, this Court had never applied the Double Jeopardy Clause to sentencing decisions after retrial. Although the *Bullington* court may have been inclined to do so because "death is different," that rationale is grounded in the Eighth Amendment principles concerning cruel and unusual punishments, not the Double Jeopardy Clause. This Court's holding in *Bullington* applying the Double Jeopardy Clause to sentencing proceedings is inconsistent with the holdings in *North Carolina v. Pearce, supra,* and *United States v. DiFrancesco, supra.* Although the Court distinguished these cases because of the "unique" procedures employed during Missouri capital sentencing proceedings, the analytical "difference is immaterial for the purpose of the Double Jeopardy Clause." *Bullington v. Missouri, supra,* 451 U.S. at 448, n.2 (Powell, J. dissenting).

Simply because the first jury declined to impose the death penalty does not establish that the state failed to prove its case. Such analysis could be equally applicable to non-capital cases after retrial which included opening statements, evidence, jury instructions and deliberations, and which the jury imposed a harsher sentence than the first jury, a situation which has been consistently allowed by this Court. *Stroud v. United States,* 251 U.S. 15 (1919).

Application of the Double Jeopardy Clause should not depend on the procedural niceties established by each state.

A state could establish a capital or non-capital sentencing scheme that has a full range of sentences, not just the life imprisonment or death option in *Bullington*. A state need not provide for jury sentencing. *Clemons v. Mississippi*, 494 U.S. 738 (1990). A state could also not afford a bifurcated proceeding which distinguished *Bullington* from *Stroud*. The constitutional minimum required by this Court, *Graham v. Collins*, 113 S.Ct. 892, 915-17 (1993) (Stevens, J. dissenting), could be utilized by a state without invoking the procedures rationale of *Bullington*. The phrase "death is different" does not explain the procedures rationale in *Bullington*.

As Justice Powell points out in his dissent in *Bullington*, "[u]nderlying the question of guilt or innocence is an objective truth," 451 U.S. at 450. The sentencing function is not to establish the facts underlying the conviction, but rather to determine the punishment the jury sees fit. This punishment is subjective and lies within the discretion of the sentencer. As long as the punishment imposed is within the allowable statutory range, the sentence cannot be determined erroneous.

The policy concerns of the Double Jeopardy Clause are not present in a sentencing proceeding. Sentencing is part of the original proceeding. The purpose of sentencing is to impose punishment that fits the offender. *Williams v.*

New York, 337 U.S. 241, 248 (1949) While the trial focuses on the defendant's conduct, the sentencing focuses on the defendant's status; *e.g.*, his age, his mental ability, his background and the like. The status of a defendant is only relevant upon the jury's finding that the defendant's conduct violated the law. A determination of status cannot be had without the finding that the defendant's conduct violated the law. The sentencing is therefore a continuation of the original proceeding and not a separate proceeding subject to the protection of the Double Jeopardy Clause. Societal interest in assessing punishment that fits the offender outweighs the defendant's right to finality of a sentence.

Likewise, the purpose of a prior and persistent status is not to enhance punishment on an arbitrary basis, but rather to achieve society's goals of punishment that ensures an accurate sentence for defendants who repeatedly violate the laws. Societal goals of punishing repeat offenders far outweigh a defendant's rights in sentencing. *See Furman v. Georgia*, 408 U.S. 238, 308 (1972) (Stewart, J., concurring)

For instance, under Missouri's capital sentencing scheme a jury need not impose a sentence of death even if they find that the prosecutor proved the statutory aggravating circumstances making a defendant eligible for the death penalty. *State v. Petary*, 790 S.W.2d 243, 246 (Mo. 1990), *cert. denied*, 498 U.S. 973 (1990). The Missouri Approved

Instructions allows the jury to impose life imprisonment even when the prosecutor has presented sufficient aggravating circumstances:

> Even if you decide that a sufficient mitigating circumstance or circumstances do not exist which outweigh the aggravating circumstance or circumstances found to exist, you are not compelled to fix death as the punishment. Whether that is to be your final decision rests with you (MAI-CR2d 15.46).

Bullington's holding that a jury's recommendation of life imprisonment is an implied acquittal of the death penalty overlooks the jury's discretion in sentencing in capital cases. An acquittal of a higher offense implies that the jury did not find sufficient evidence of the higher offense. *Green v. United States*, 355 U.S. 184 (1957). However, in a capital case, the jury may sentence a defendant to life imprisonment even though the state has proved, beyond a reasonable doubt, the statutory aggravating circumstances. *Bolder v. Armontrout*, 921 F.2d 1359, 1367 (8th Cir. 1990), *cert. denied*, 112 S.Ct. 154 (1991). The jury's sentence of life imprisonment does not imply that the evidence is insufficient.

The question is not whether the sentencing proceeding resembles a trial, but rather "whether the reasons for considering an acquittal on guilt or innocence as absolutely final apply equally to a sentencing decision imposing less

than the most severe sentence allowed by law." *Bullington v. Missouri, supra* 451 U.S. at 450 (Powell, J. dissenting). The past precedent of this Court has clearly held that the Double Jeopardy Clause does not attach to sentencing decisions even if defendant receives a greater sentence on retrial. In fact, this Court itself said that there are "fundamental distinctions between a sentence and an acquittal, and to fail to recognize them is to ignore the particular significance of an acquittal." *United States v. DiFrancesco, supra*, 449 U.S. at 133. "Thus, it may be said with certainty that history demonstrates that the common law never ascribed such finality of a sentence" as it does to guilt or innocence. *Id.* 449 U.S. at 134. There is no expectation of finality of a sentence until an appeal is concluded or the time for an appeal has expired. *Id.* 449 U.S. at 136. In *Bullington*, this Court itself noted that:

> This Court, however, has resisted attempts to extend that principle [Double Jeopardy] to sentencing. The imposition of a particular sentence usually is not regarded as an "acquittal" of any more severe sentence that could have been imposed. *Id.* 451 U.S. at 438.

Although *Bullington* extended the Double Jeopardy Clause to capital sentencing proceedings, the Court has not been inclined to extend it any further. *Poland v. Arizona*, 476

U.S. 147, 155-156 (1986) (Court declined to "extend *Bullington* further").

"The Constitution does not require that sentencing should be a game in which a wrong move by the judge means immunity for the prisoner." *Bozza v. United States*, 330 U.S. 160, 166-167 (1947). The degree of finality given to the guilt phase of a trial is significantly different from that given to sentencing. The Double Jeopardy Clause applies to guilt or innocence because it prevents the possibility of a defendant being tried after acquittal. "A retrial of a defendant once found to have been innocent 'enhance[es] the possibility that even though innocent he may be found guilty.'" *Bullington v. Missouri*, 451 U.S. at 451 (Powell, J. dissenting), *quoting Green v. United States*, 355 U.S. 184, 188 (1957). The concern and anxiety relate to the determination of guilt or innocence and not to a defendant's status. *United States v. DiFrancesco, supra*, 449 U.S. at 136. Once a defendant is found guilty, "[t]he defendant is subject to no risk of being harassed and then convicted, although innocent." *Id.*

The concern that an innocent defendant may be convicted does not apply to sentencing which is purely discretionary because the purpose of sentencing is to assess a punishment that fits the offender. *North Carolina v. Pearce, supra*, 395 U.S. at 723. At the sentencing stage, the

defendant has already been found to be guilty, *Herrera v. Collins*, 113 S.Ct. 853, 860 (1993) (once convicted "presumption of innocence disappears"). The concerns of the death penalty are protected under the Eighth Amendment that are guaranteed by State and Federal Courts. *See Herrera v. Collins, supra*, 113 S.Ct. at 863 (punishment, not guilt, is "properly examined within the purview of the Eighth Amendment"). Further, the states generally provide additional protections under state procedural laws, guaranteed by the State Courts, beyond the constitutional minimum. These include mandatory review of death penalties. In these circumstances, the concerns of the Clause are not necessary.

The possibility of a higher sentence after retrial has been previously accepted by this Court as "a legitimate concomitant of the retrial process." *Chaffin v. Stynchcombe*, 412 U.S. 17, 25 (1973). Absent vindictiveness, a higher sentence at retrial is permissible. *Id.* The first prerequisite for an improper retaliatory penalty is knowledge of the prior sentence. *Id.* 412 U.S. at 26. Distinctions between jury and judicial sentencing diminish the possibilities of impropriety when a jury presents a defendant with a higher sentence after retrial. *Id.* 412 U.S. at 27. The jury will have no personal stake to engage in self-vindictiveness that a judge or prosecutor may have. *Id.* Thus, a jury who gives a defendant a higher sentence after retrial poses no real threat

of vindictiveness. *Id.* 412 U.S. at 28. Likewise, the incidental deterrent effect of the possibility of a greater sentence after retrial does not violate any constitutional right of a defendant absent a showing of vindictiveness. *Id.* 412 U.S. at 29-30. As this Court held in *Chaffin v. Stynchcombe, supra,* "we doubt the 'chill factor' [of a higher sentence on retrial] will often be a deterrent of any significance." *Id.* 412 U.S. at 33.

The Court's departure from the standard that sentencing is not afforded the finality given the guilt or innocence phase of a trial should be corrected by overruling the decision in *Bullington*. The holding in *Bullington* is not such a well-established precedent that this Court should be concerned by the overruling of *Bullington*. *See United States v. Dixon*, 61 U.S.L.W. 4835 (U.S. June 28, 1993). This Court's unwillingness to extend *Bullington* by distinguishing it from other cases establishes that *Bullington* is contrary to past precedents.

CONCLUSION

Petitioners pray that this Court reverse the United States Eighth Circuit Court of Appeals' holding extending the application of *Bullington* to non-capital sentencing proceedings. Furthermore, petitioners request that this Court overrule its decision in *Bullington* and hold that the Double Jeopardy Clause does not apply to capital or non-capital sentencing proceedings.

Respectfully submitted,

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